

EXHIBIT 1  
DATE 1/25/07  
HB 314

# **House Bill 314**

**An act to clarify appointment  
authority for airport authorities**

**Testimony on behalf of the Cascade County Commission  
presented by Commissioner Joe Briggs**

## Overview:

Airport authorities in Montana have been granted a great deal of power by past legislation.

These powers include but are not limited to:

- ✓ the ability to force municipal governments to levy taxes for airport operations
- ✓ enter into multi million dollar contracts
- ✓ apply for and accept grants from state, federal and private entities
- ✓ levy fees for services
- ✓ accept loans and enter into debt
- ✓ exercise the powers of imminent domain
- ✓ issue bonds

This partial list of powers is adequate to demonstrate that airport authorities have at their disposal an array of powers usually reserved for elected bodies yet the Airport Authorities are appointed.

**Particularly concerning are the powers to tax, exercise imminent domain and the accrual of debt which in the case of dissolution by the airport authority would revert to the government bodies which created the airport authority.**

The primary check on the power of an Airport Authority is the ability of the creating government bodies to appoint the members of the Airport Authority Board. This is why the continued refusal of the Great Falls Airport Authority to seat the appointment made by the Cascade County Commission on February 14, 2006 represents such a serious concern.

Unlike legislators or County Commissioners, these Airport Authority board members can not be recalled by the people, they answer to the people only though the appointment power of the creating bodies and the courts. In this particular case, the Airport Authority has ignored the appointment powers of the Cascade County Commission, ignored an opinion from the Cascade County Attorney and appealed a ruling from State District Judge Tucker.

The results of these actions are that for nearly a year, the Airport Authority has been operating with an illegally constituted board. They have been expending public funds to pursue legal maneuvers to postpone the seating of our

appointment and have attempted unsuccessfully to force the City of Great Falls and the Cascade County Commission to accept an appointment process which allows them to control who sits on their board.

Their justification for their action hinges on the phrase "and qualified" contained in the current law shown below in bold:

**" 67-11-104. Commissioners. (1) The powers of each authority shall be vested in the commissioners thereof. A majority of the commissioners of an authority shall constitute a quorum for the purpose of conducting business of the authority and exercising its powers and for all other purposes. Action may be taken by the authority upon a vote of not less than a majority of the commissioners present.**

(2) There shall be elected a chairman and vice-chairman from among the commissioners. An authority may employ an executive director, secretary, technical experts, and such other officers, agents, and employees, permanent and temporary, as it may require and shall determine their qualifications, duties, and compensation. An authority may delegate to one or more of its agents or employees such powers or duties as it may deem proper.

(3) A commissioner of an authority shall be entitled to the necessary expense, including travel expenses, as provided for in 2-18-501 through 2-18-503, incurred in the discharge of his duties. **Each commissioner shall hold office until his successor has been appointed and has qualified.** The certificates of the appointment and reappointment of commissioners shall be filed with the authority."

The Great Falls Airport Authority asserts that this phrase gives them the ability to judge and "qualify" the appointments made by the City and County Commissions.

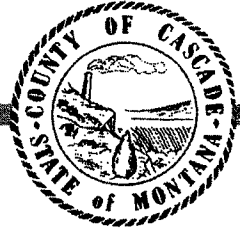
In this particular case they contend since our appointee is the pilot for D.A. Davidson and DADCO rents hanger space from the Airport Authority, he has a conflict of interest so serious as to prohibit his sitting on the board.

This claim was examined by the Cascade County Attorney prior to the appointment and found to be invalid. The examination determined that contrary to the Airport Authorities claims, our appointee was not a corporate officer of D.A. Davidson and company, he was not responsible for the negotiation of the hanger lease, he was not named in the lease and was not "unqualified" to serve. He would simply need to remove himself from discussions involving the hanger rented by his employer.

We do not seek to hamstring the airport authorities in any way, we do not call for a reduction of their authority to conduct business, we simply ask the legislature to restore the checks and balances originally intended by having the members of an Airport Authority appointed by the elected Commissioners of the creating bodies. This is all HB 314 seeks to accomplish.

# Cascade County

*State of Montana*



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*Brant S. Light*  
*County Attorney*

*121 - Fourth Street North*  
*Great Falls, Montana 59401*

February 28, 2006

Cascade County Board of Commissioners  
325 2<sup>nd</sup> Avenue South  
Great Falls, MT 59401

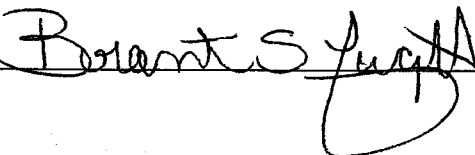
Dear Board:

You asked for an opinion as to who has authority to appoint board members to the Airport Authority Board. It is my opinion that the Board of County Commissioners and the Great Falls City Commission jointly has the authority to appoint the Board members. Once appointed the Airport Authority Board does not have the power to refuse to swear in and sit the appointed board member.

The Montana Code grants the power to appoint the members of the Airport Authority Board with the governing bodies of the public agencies that created the Authority. The Great Falls City Commission and Cascade County Board of Commissioners originally created the Regional Airport Authority by Joint Resolution #7451/80-1 pursuant to Montana Code Annotated §67-11-103. Both authorities then amended the resolution in 1999 by Joint Resolution #9036/99-83 increasing the size of the board and granting the City Commission the power to appoint 4 board members and the County Commission the power to appoint 3 board members. The authority to appoint the board members rests in these resolutions and in the Montana Code §67-11-103 and §67-11-204. There is nothing in the resolution or in the MCA that allows the Airport Authority Board or the managing staff of the Airport Authority the power to refuse to swear in and sit an appointed member of the Board.

Sincerely,

BRANT S. LIGHT,  
CASCADE COUNTY ATTORNEY

By: 



**Clarification of a governing body's appointment rights to an Airport Authority.**

**WHEREAS, the laws of Montana sections 67-11-101 through 67-11-107 empower the creation of municipal and regional Airport Authorities; and**

**WHEREAS, the laws of Montana are designed to utilize elected representation as a check on the power of appointed agents of the state and local government; and**

**WHEREAS, the checks on the authority and power of the Airport Authority boards is vested in the appointment powers of the governing bodies; and**

**WHEREAS, the Great Falls Regional Airport Authority has presumed to take on the authority to judge the qualifications of an appointment made by one of its governing bodies; and**

**WHEREAS, said Airport Authority has refused to seat the appointee of its governing body base upon its internally generated policies; and**

**WHEREAS, said Airport Authority has continued to conduct business for several months with an unlawfully constituted board; and**

**WHEREAS, said Airport Authority has ignored the written opinion of the County Attorney as to its lack of authority in the matter as well as a written order from the County Commission to seat the appointee.**

**NOW, THEREFORE, BE IT RESOLVED, that the Montana Association of Counties will seek legislation clarifying that it is the exclusive right of the governing bodies to make appointments to the airport authorities who were created through their actions. Further we seek to codify that the qualifications required and process through which these appointments are made is the exclusive right of the governing bodies and that Airport Authorities lack any ability to refuse to seat the appointees named by their governing bodies.**

**SPONSOR: Cascade County Commissioners**

**RECOMMENDATION: Do pass**

**ADOPTED: September 27, 2006**

### **Compiler's Comments:**

The legislation which allows for the creation of Airport Authorities vests significant authority and autonomy on a small number of appointed individuals. This authority includes the ability to mandate the levying of municipal taxes on their behalf (67-11-301). MCA 67-11-103 (3) limits the ability of a City or County to disassociate from a Regional Airport Authority by requiring the agreement of the Airport Authority in the disassociation; I.E. once created, the entity can not be dissolved without its concurrence. This leaves the appointment power of the governing authorities as only protection for the taxpayers from "*Taxation without Representation*". The assertion of the Great Falls Airport Authority that it may control who is appointed to its ranks represents a serious and dangerous challenge to an already strained check and balance on their authority.

Joe Briggs  
Cascade County Commission

CLERK OF DISTRICT COURT

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FILED

BY \_\_\_\_\_  
DEPUTY

MONTANA EIGHTH JUDICIAL DISTRICT, CASCADE COUNTY

BOARD OF CASCADE COUNTY  
COMMISSIONERS,

Cause No. CDV-06-294

Plaintiff,

vs.

**ORDER GRANTING  
PETITION FOR WRIT OF  
MANDAMUS**

GREAT FALLS INTERNATIONAL  
AIRPORT AUTHORITY

Defendant.

On January 18, 2006 Johannes applied to become a commissioner of the Great Falls International Airport Authority ("GFIAA"). The evidence indicates that there were several applicants. On February 14, 2006 Cascade County considered a motion to appoint Johannes. Cascade County was informed of Johannes' potential conflict of interest. Cascade County exercised its discretion and unanimously voted to appoint Johannes. There is no evidence nor assertion that the appointment was in bad faith or unfair. However, GFIAA refused to swear in and seat Johannes. Cascade County filed a petition for a writ of *mandamus* to compel GFIAA to do so.

Cascade County argues that a writ of mandate may be issued to compel the admission of a party to the use and enjoyment of right or office which the party is entitled and from which the party has been unlawfully precluded. Cascade County argues that

1 Johannes is entitled to office as a commissioner of GFIAA, but that the GFIAA has  
2 unlawfully precluded Johannes from serving. Therefore, Cascade County argues that the  
3 Court should order GFIAA to swear in and seat Johannes.  
4

5 The GFIAA contends that the petition should be denied for the following reasons:  
6 improper service; the petition was not brought by a real party in interest; Cascade County  
7 has a plain, speedy and adequate remedy in the ordinary course of the law; a writ of  
8 mandamus may be issued only based upon affidavit of a party beneficially interested; the  
9 GFIAA has no clear legal duty to seat or swear in an unqualified candidate; the decision  
10 to seat a candidate is a discretionary matter not susceptible to a writ of mandate; Johannes  
11 is precluded by law from serving on the GFIAA; and only the GFIAA has the authority to  
12 qualify its members.  
13

14 There are two requirements to obtain a writ of mandate. First, the party must  
15 demonstrate an entitlement to the performance of a clear legal duty by the party against  
16 whom the relief is sought. Second, there must be an absence of a plain, speedy and  
17 adequate remedy in the ordinary course of law. Section 27-26-102 M.C.A.  
18

19 **Clear Legal Duty/Discretionary Action/"Qualification" of Appointees**

20 Section 27-26-102 (1) M.C.A. states in relevant part:

21 A writ of *mandamus* may be issued by the supreme court or the district  
22 court or any judge of the district court to any lower tribunal, corporation,  
23 board, or person to compel the performance of an act that the law specially  
24 enjoins as a duty resulting from an office, trust, or station or to compel the  
25 admission of a party to the use and enjoyment of a right or office to which  
the party is entitled and from which the party is unlawfully precluded by  
the lower tribunal, corporation, board, or person.

26 GFIAA has argued that Cascade County is not a real party in interest. Apparently  
27 GFIAA contends that Cascade County is not an office holder and that a non-office holder  
28 has no standing. Perhaps GFIAA is correct if analysis is limited to office holder status.  
However, that issue is not dispositive and need not be considered.



Cascade County petitioned for a writ to compel GFIAA to seat and swear its appointee. "The writ is available where the party who applies for it is entitled to the performance of a clear legal duty by the party against whom the writ is sought." *Becky v. Butte-Silver Bow Sch. Dist. No. 1*, 274 Mont. 131, 135, 906 P. 2d 193, 195 (1995).

Cascade County should prevail if it demonstrates that GFIAA has a clear legal duty to seat and swear in Cascade County's appointees. Thus, Cascade County may be entitled to a writ of mandate regardless of office holder status. It is necessary only for Cascade County to establish that it is entitled to the performance of a clear legal duty.

Section 67-11-103(1) M.C.A. states in pertinent part:

Two or more municipalities may by joint resolution create a...a regional airport authority. The resolution creating a regional airport authority must create a board of not less than five commissioners; the number to be appointed, their terms and compensation, if any, must be provided for in the resolution...

The City of Great Falls and Cascade County created the GFIAA by Joint Resolution 7451/80-1. The joint resolution provided that GFIAA's Board consists of five members; three appointed by the City of Great Falls and 2 appointed by Cascade County. Joint Resolution 7451/80-1 was amended by Joint Resolution 9036/99-83. The Amended Resolution provides that the GFIAA's Board consists of seven members, 4 appointed by the City of Great Falls and 3 appointed by Cascade County.

Clearly, Cascade County appoints GFIAA board members. GFIAA does not dispute Cascade County's appointment power. However, GFIAA contends that although Cascade County appoints board members, the GFIAA qualifies Cascade County's appointees. In essence GFIAA argues that it determines whether Cascade County appointees may serve.

The Montana Supreme Court has stated: "The power to appoint carries with it a presumption that the appointing power is also necessarily discretionary. The

1 determination of the appointing board or officer as to the qualifications of applicants  
2 involves official discretion, and, when made fairly and in good faith, is final. *Shapiro v.*  
3 *Jefferson County*, 278 Mont. 109, 116-177, 923 P. 2d 543 (1996). There is no assertion  
4 that Cascade County proceeded unfairly or in bad faith. *Shapiro* demonstrates that  
5 "qualification" is considered, completed and subsumed in the act of appointment. No  
6 further review is necessary nor allowed by the entity to which the appointee is appointed.  
7 Therefore, the appointing party determines whether an appointee is qualified. The rule  
8 employs simple logic. To allow an appointee to be qualified by a party other than the  
9 appointing party would completely eviscerate the power of appointment. Appointments  
10 would be reduced to mere job applications. *Shapiro* instructs otherwise.  
11

12  
13 Moreover, Joint Resolution No. 9036/99-83 states in part:

14 [S]aid commissioners shall serve until the expiration of their terms unless  
15 earlier removed by act of the City Commission of the City of Great Falls  
16 or the board of Commission of Cascade County, whichever appointed the  
said Regional Airport Authority Commissioner.

17 Cascade County not only appoints GFIAA board members, but may also remove  
18 GFIAA board members. Thus, Cascade County retains significant control over its  
19 appointees. The Resolution does not mention any GFIAA power regarding appointees.  
20 Although not determinative, this does not indicate that the GFIAA has any control over  
21 who may qualify for its board.  
22

23 GFIAA has cited various statutes regarding the powers of a regional airport  
24 authority. The GFIAA is correct that it has the power and right to make rules for its  
25 operation and management. Section 67-11-104 M.C.A. However, this argument involves  
26 the conduct of GFIAA business by its commissioners. It has no impact upon the  
27 authority of its organizing entities to appoint the commissioners. *Shapiro* instructs that  
28 such authority is vested in Cascade County and the City of Great Falls, not GFIAA.

## Conflict of Interest

GFIAA argues that Johannes may not serve due to a conflict of interest. The conflict of interest is asserted because it is argued that Johannes is an employee of a tenant of the airport which GFIAA administers. GFIAA is concerned that Johannes has a prohibited conflict regarding such things as tenant leases. Section 2-2-201 MCA generally prohibits government employees from any interest in any contract made by them in their official capacity if they are directly involved with the contract. Arguably, Johannes' circumstances do not involve a direct interest in contracts about which GFIAA is concerned. See, Section 2-2-201(2)(c) MCA. However, the dispositive consideration is found in Section 2-2-131 MCA. A public employee shall, prior to acting in a manner which may impinge upon his public duty, including the award of a contract, disclose the nature of the private interest which creates the conflict. If the public employee then performs the official act involved, the employee shall state for the record the fact and summary nature of the interest disclosed at the time of performing the act. Clearly, the statutes allow Johannes to serve and to act even if GFIAA's assertions regarding his position are true.

A conflict of interest, even if true, does not prohibit Johannes from serving as a commissioner for GFIAA.

## Real Party in Interest/Beneficial Interest

Cascade County, not Johannes, is the aggrieved party. It is not asserting that it is entitled to hold office. Cascade County is the real party in interest seeking to enforce its right to appoint. The real party in interest is clearly the party who will be beneficially interested by a successful prosecution of its claim.

### Improper Service

Defendant argues "improper service" prevents the suit from proceeding. Nonetheless, Defendant has responded with a variety of substantive arguments. There is no merit in dismissing a case for refileing in which the substantive issues already have been briefed. Defendant has waived its procedural argument, even if the argument had merit.

### Absence of a Speedy and Adequate Remedy

Cascade County argues that it has no speedy or adequate remedy in the ordinary course of the law. GFIAA contends that Cascade County has other available, speedy and normal remedies.

A writ of mandate may be issued only when there is no plain, speedy and adequate remedy in the ordinary course of law. Section 27-26-102 M.C.A. "The mere existence of another remedy will not bar the issuance of a writ of mandate; the alternative remedy must be one that itself enforces the performance of the particular duty." *State ex rel. Burkhartsmeyer Bros. v. McCormick*, 162 Mont. 234, 238 510 P. 2d 266, 268 (1973).

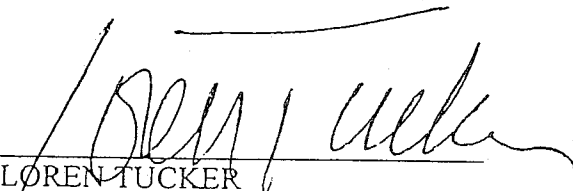
Arguably a declaratory judgment action could resolve a number of issues raised by both parties in this dispute. However, it would not provide an adequate remedy. Cascade County's writ of mandate seeks to have its appointee seated and sworn in. Declaring the respective rights of the parties would not provide that relief. Only a writ of *mandamus* can give Cascade County a complete remedy. No other adequate remedy exists. Therefore, Cascade County has no other plain, speedy, and adequate remedy for relief.

Based on the foregoing considerations Cascade County's writ of *mandamus* should be granted. GFIAA should immediately swear in and seat Johannes as a commissioner.

1 NOW THEREFORE, IT IS HEREBY ORDERED that:

- 2 1. Cascade County's petition for a writ of *mandamus* is granted.
- 3 2. GFIAA's Board shall seat and swear in Johannes forthwith.
- 4 3. The Clerk of Court will please file this Order and distribute a copy to all
- 5 parties.
- 6

7 Dated: July 27, 2006.

8   
9 LOREN TUCKER  
10 District Judge  
11

12

13 cc: Bonilla  
14 Moulton, Bellingham, Long & Kachell  
15 PDB 2559  
16 Bellingham 5/9/03  
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